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91-1681

No. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

EWING POLLOCK AND POLLOCK, POLLOCK AND THOMAS,
Petitioners,

vs.

JAMES E. HUGHES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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April 18, 1992

QUESTIONS PRESENTED

1. Did the Third Circuit fail to pay sufficient deference to the District Judge's Order setting aside the first jury's award of compensatory damages under the federal abuse of discretion standard of review?

2. In relation to the second jury's award of punitive damages, did the District Court abuse its discretion as a matter of law, and deny due process to cross-petitioners, in refusing to charge the second jury as required by Pennsylvania law that cross-petitioners' conduct must be found outrageous as a prerequisite to an award of punitive damages?

3. Did the District Court err in permitting the petitioners' expert witnesses to testify as to value where such testimony was without basis in fact or law?

PARTIES TO THE PROCEEDING

The cross-petitioners joining in this cross-petition are: Ewing Pollock and Pollock, Pollock and Thomas.[1]

Other parties are: Consol Pennsylvania Coal Company; Greenon Coal Company (formerly called Rheinbraun U.S. Corporation); The Monogahela Railway Company; Consolidation Coal Company; Consol Land Development Company; Maria Theresia Bergbuagesellschaft mbH; Rheinbraun A.G.[2]; William Resse; David Boggs; and the Upshur Agency, Inc.

The petitioners are: James E. Hughes; Linda L. Hughes; Dorothy Loughman: Paul H. Kent; Mabel Kent; James C. McIntyre; Glenna McIntyre; Larry Levine; Dan Levine; Morris Levine; Edward Levine; Morris Levine Enterprises, Inc.; Levine Iron & Metal, Inc.; John W. Yesenosky, Jr.; Linda M. Yesenosky; Thomas J. Allen and Estate of John T. Throckmorton; Mark E. Headlee; and Charlotte B. Headlee.

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[1] Pursuant to Rule 29.1, the Court is advised that this cross-petition is filed on behalf of an individual and a law firm and no corporation, parent or subsidiary is involved.

[2] These foregoing parties have previously filed a Petition for Writ of Certiorari at No. 91-1324.

TABLE OF CONTENTS

Page

Table of Authorities.....1

Opinions Below.....5

Jurisdiction.....5

Constitutional Provision Involved.....6

STATEMENT OF THE CASE

Preliminary Statement.....6

Proceedings in the District Court.....7

The Factual Background.....7

b. The First Trial.....8

c. The Second Trial.....11

Proceedings in the Third Circuit.....12

REASONS FOR GRANTING THE WRIT

Summary of Argument.....13

I. THE THIRD CIRCUIT MISAPPLIED THE ABUSE OF DISCRETION STANDARD TO THE ORDER OF A NEW TRIAL ON COMPENSATORY DAMAGES....15

II. AT THE SECOND TRIAL, THE DISTRICT COURT ABUSED ITS DISCRETION AS A MATTER OF LAW, AND DENIED DUE PROCESS TO CROSS-PETITIONERS WHEN THE COURT REFUSED TO INSTRUCT THE JURY THAT IT MUST FIND CROSS-PETITIONERS' CONDUCT OUTRAGEOUS IN ORDER TO AWARD PUNITIVE DAMAGES.....18

TABLE OF CONTENTS (cont.)

Page

III. THE DISTRICT COURT ERRED IN PERMITTING THE TESTIMONY OF PETITIONERS' EXPERT WITNESSES AS TO VALUE WHERE THE TESTIMONY WAS WITHOUT BASIS IN FACT OR APPROPRIATE METHODOLOGY, AND FAILED, AS MATTER OF LAW, TO ESTABLISH THAT PETITIONERS WERE PAID LESS THAN FAIR MARKET VALUE.....21

CONCLUSION.....24

TABLE OF AUTHORITIES

In re: Air Crash Disaster at New Orleans, Louisiana, 795 F. 2d 1230 (5th Cir. 1986)

American Employers Ins. Co. v. Southern Seeding Services, Inc., 931 F.2d 1453 (11th Cir. 1991)

Anderson v. Bessemer City 470 U.S. 564 (1985)

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)

Cone v. West Virginia Pulp & Paper Co, 330 U.S. 212 (1947)

Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2458 (1990)

DiRose v. PK Management, 691 F.2d 628 (2d Cir. 1982)

Feld v. Merriam 506 Pa. 383, 485 A.2d 742 (1984)

Garella v. Redevelopment Authority of Allegheny County, 413 Pa. 181, 196 A.2d 344 (1964)

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)

Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555 A. 2d 800 (1989)

Loughman v. Consol-Pennsylvania Coal Co., 740 F.Supp. 1114 (W.D. Pa. 1990)

Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991)

Molzof v. United States, 112 S.Ct. 711 (1992)

Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991)

Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989)

Roe v. Deere & Co., 855 F.2d 151 (3d Cir. 1988)

Salve Regina College v. Russell, 111 S.Ct. 1217 (1991)

Semper v. Santos, 845 F.2d 1233 (3d Cir. 1988)

Shanno v. McGee Industrial Enterprises, Inc., 856 F.2d 562 (3d Cir. 1988)

United States v. United States Gypsum Co., 333 U.S. 364 (1948)

CONSTITUTION, STATUTES AND RULES

U.S. Const. amend. V.

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-68 (1988 & Supp. 1989)

28 U.S.C. §1254 (1) (1988)

28 U.S.C. §1291 (1988)

28 U.S.C. §1331 (1988)

Fed. R. Civ. P. 52

Fed. R. Civ. P. 59

Miscellaneous

Henry J. Friendly, Indescretion About Discretion, 31 Emory L.J. 747, 759 (1982)

6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice §59.08 [6] (2d ed. 1989)

IN THE

SUPREME COURT OF THE UNITE[illegible]TES

October Term, 1991

JAMES E. HUGHES, et

P[illegible]oners,

vs.

CONSOL PENNSYLVANIA COAL C[illegible] al.,

Cross [illegible]itioners.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The cross-petitioners respectfully pray that a writ of certiorari issue to review the amended judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on December 20, 1991. This cross-petition adopts and restates, in part, the petition for writ of certiorari filed by the Consol Petitioners at No. 91-1324.

OPINIONS BELOW

There have been three relevant opinions below:

1. Loughman v. Consol-Pennsylvania Coal Co., No. 83-921 (D.C.W.D. Pa., 1987) (Teitelbaum, D.J.) (ordering partial new trial) (unreported) (A-104a);[3]

2. Loughman v. Consol-Pennsylvania Coal Co., 740 F.Supp. 1114 (W.D. Pa. 1990) (Smith, D.J.) (denying post-trial motions after second trial) (A-70a); and

3. Hughes v. Consol-Pennsylvania Coal Co., No. 90-346 (3d Cir. Dec. 20, 1991) (Nygaard, C.J.) (vacating second damages award and reinstating first) (amended and restated opinion) (A-1A).[4]

JURISDICTION

These were eight consolidated actions for fraud and conspiracy under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO"), and at common law. The District Court had subject-matter jurisdiction under 28 U.S.C. §1331 and, on principles of pendent jurisdiction as to the state law claims.

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[3] References to pages of the appendix attached to petitioners' petition for writ of Certiorari are in the form "(A___)".

[4] The original opinion of the Third Circuit is reported at 945 F2.d 594. The opinion of December 20, 1991, amends and restates the original opinion in its entirety.

The Court of Appeals had jurisdiction to hear the appeal from the final judgment from the District Court under 28 U.S.C. §1291. The original opinion of the Court of Appeals issued September 20, 1991, and is reported at 945 F.2d 594. Timely petitions for rehearing with suggestions for rehearing en banc were filed by all parties. Cross-petitioners' petition was denied on October 23, 1991. Petitioners' petition was denied on December 20, 1991. The amended and restated opinion and judgment of the Court of Appeals were entered December 20, 1991. Petitioners filed their petition for certiorari on March 19, 1992. The petition was received by cross-petitioners' on March 21, 1992. The cross-petition for a writ of certiorari was filed within thirty days of that date. Sup. Ct. R. 12.3. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Preliminary Statement

These cases concern the misapplication by the Court of Appeals of the abuse of discretion standard to the review of a District Court's order of a partial new trial to redetermine both compensatory and punitive damages. The partial new trial was granted by a highly experienced District Court Judge because, on the "overwhelm-

ing evidence," (the damages awarded by the first jury were "obscenely excessive." (A-105a) On appeal from the judgment on the second jury's verdict, the Court of Appeals vacated the second jury's lesser award of compensatory and punitive damages and reinstated the "obscenely excessive" award of compensatory and punitive damages of the first jury.

Proceedings in the District Court

a. The Factual Background

In 1981, Consolidation Coal Company ("Consol"), a coal producer based in Pittsburgh, Pennsylvania, and Rheinbraun A.G., a coal producer of Cologne, Germany, and affiliates ("Rheinbraun"), formed a joint venture to develop coal reserves near Waynesburg, Pennsylvania. The mine was to be located near the junction of a railroad operated by The Monongahela Railway Company ("Monongahela"). Construction of the spur on a right-of-way running from the mine to the junction was necessary. As planned, the right-of-way would run over largely vacant, rural parcels of land. By 1982, all parcels necessary were purchased by Monongahela. Ewing Pollock, an attorney, and the law firm of Pollock, Pollock and Thomas in which he was a partner, represented Consol and Monongahela in the title work and closings involved in the acquisition.

In early 1983, petitioners filed eight separate actions in the United States District Court for the Western District of Pennsylvania (Pittsburgh) against Consol, Rheinbraun, The Monongahela, Ewing Pollock, Pollock, Pollock & Thomas, and others. The petitioners alleged.

fraud and conspiracy under the RICO statute, 18 U.S.C. §§1961-68 and at common law, perpetrated by the cross-petitioners' and others during the negotiations for purchase of the petitioners' real estate. The frauds alleged included false statements that only The Monongahela, and not Consol, was involved in the purchases, and that part of the purchase price would be tax-free to the sellers. Petitioners demanded compensatory and punitive damages.

b. The First Trial

The cases were consolidated and tried to a jury in early 1987. The Honorable Hubert I. Teitelbaum, an experienced federal trial judge, presided. During the first trial, the judge and jury viewed the real estate in question.

The first jury found the cross-petitioners and others liable under one or more claims, and awarded compensatory damages aggregating $5,360,500. The jury also awarded punitive damages in the amount of $35,000 against cross-petitioners.

On October 22, 1987, Judge Teitelbaum granted cross-petitioners' motion for judgment n.o.v. on the RICO claims and, in respect to the pendent state law claims, ordered a partial new trial on the damage issue (after petitioners refused remittitur), characterizing the jury's award as "obscenely excessive" (A-105a). He held that the "overwhelming evidence" indicated that the petitioners' properties which he and the jury had viewed were worth far less than the values found by the jury:

> For example, the jury awarded the Hughes' (Civil Action No. 876-1678) (sic) $122,000 in damages, even though they had purchased that same property some four years earlier for a mere $9,500. Dorothy Loughman (Civil Action No. 83-921) had sold ten acres of her property for only $800 per acre approximately six years prior to the sale of another portion of the same property to defendants. The jury, however, awarded her damages amounting to approximately $100,000 per acre for the portion of her property she sold to the defendants. The Yesenoskys had listed their property as being for sale in 1980 for $40,00. The jury awarded the Yesenoskys $435,000 in damages for the sale of their property to defendants less that two years later. (A-113a).

Judge Teitelbaum also held that petitioners' witness on real estate valuation, Mr. Bodnar, adopted an untenable theory of valuation. Bodnar's method was to value the petitioners' parcels on the basis of the prices paid to the last three of fifty sellers in a series of parcels, purchased by The Monongahela as it rushed to complete the mining project. The court held:

> [T]he jury obviously relied heavily on the testimony of Mr. Bodnar, who explained on cross-examination that his figures were based largely on the prices paid to three (out of some fifty) land owners who were the last to sell their properties for the railroad

> right-of-way: Grover Phillipi ($146,670 per acre); John Culp ($75,216per acre); and Sarah Closser ($240,108 per acre). All other sales, except for the three, were ignored by Mr. Bodnar in asserting the fair market value of plaintiffs' properties... It defies reason to infer that these three sales, all of them by "hold-outs", are indicative in any way of the fair market values of the properties of those who were among the earliest to sell. It is far more reasonable to infer that the prices paid to Phillipi,Culp, and Closser for their properties were far in excess of their true market values - because the defendants were operating under severe time constraints - that it is to infer the fair market values of plaintiffs' properties can be based on the prices paid to Phillipi, Culp, and Closser. (A-113-114a).

The trial judge's analysis was thus founded in reason and on inferences from the evidence that he was specially qualified to make. As Pennsylvania law precludes an award of punitive damages absent an award of compensatory damages, and as any award of punitive damages could not have born a "reasonable relationship" to an incompetent award of compensatory damages, the judge set a side the entire award.

Judge Teitelbaum's dismissal of petitioners' RICO claims was sustained by the Honorable

D. Brooks Smith and subsequently by the Third Circuit.[5]

c. The Second Trial

On March 6, 1990, a second jury trial commenced before the Honorable D. Brooks Smith. The same evidence relevant to damages, including the testimony of Mr. Bodnar, was heard by the second jury. The second jury also heard testimony of petitioners' second "valuation expert," J. Kenneth Willison.

On April 6, 1990, this second jury awarded compensatory damages of $4,262,677 and punitive damages against cross-petitioners of $23,500.

At the close of the second trial, cross-petitioners moved on April 20, 1990 for judgment n.o.v. and for a new trial. The motion was denied by Judge Smith.

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[5] Judge Teitelbaum initially held that the evidence did not prove ongoing misconduct. Petitions moved to reconsider in light of more recent Third Circuit authority and Judge Teitlebaum vacated the RICO dismissal. After this court decided H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), however, the District Court per Judge Smith reinstated the dismissal of the RICO claims. Loughman v. Pennsylvania Coal Co., 740 F. Supp. 1114 (W.D. Pa 1990), aff'd in relevant part sub. nom. Hughes v. Consol Pennsylvania Co., No. 90-3466 (3d Cir. Dec. 20, 1991).C.

Proceedings in the Third Circuit

Cross- petitioners, petitioners, and all other parties filed appeals with the Third Circuit. Cross-petitioners contended that the awards of compensatory and punitive damages by the second jury were unsupported by competent evidence and violated the Due Process Clause. Cross-petitioners also raise the admissiblility of the testimony of petitioners' experts.

The Court of Appeals (per Nygaard, C.J.) disgregarded the results of the second trial. Purporting to apply an "abuse of discretion: standard of review to Judge Teitelbaum's original order of October 22, 1987, granting a new trial on damages, the Third Circuit held that Judge Teitelbaum erred in setting aside the first jury's award in its entirety and reinstated the first award, including the award of puintive damges. Hughes v. Consol Pennsylvania Coal Co., No. 90-3466 (3d Cir. Dec. 20, 1991).

With respect to the first jury's award of compensatory damages, the panel rejected Judge Teitlelbaum's assessment of "overwhelming evidence", and his inferences therefrom relating the value of petitioners' real estate. Ignoring the trial judges's direct knowledge of the terrain an the evidence of the prices at which several of the parcels of real estate had been bought and sold shortly before the sales to the Monongahela, and solely on the bases of contrary inference form Bodnar's testimony, Judge Nygaard reinstated the first jury's award despite Judge Teitelbaum's castigating repudiation of it. The Third Circuit held:

> Though the district court correctly char- acterized Closser, Culp and Phillipi as "hold-outs", it neglected to consider that plaintiffs would have demanded more money had they known what Closser, Culp and Phillipi knew - that Counsel was involved and that Monongahela could not have condemned their property for fixed prices. . . The District Court abused its discretion by discounting Bodnar's testimony in setting aside the damage award. (A-60a-61a).

Judge Nygaard's assertion that the petitioners would have demanded more money had they known what the hold-outs knew was speculation unsupported by the record and contrary to finding some inferences of the trial judge based on the "overwhelming evidence." Under the abuse of discretion standard as applied to issues of fact, a court of appeals may not engage in such speculation.

REASONS FOR GRANTING THE WRIT
Summary of the Argument

These cases involve referring isssues of complelling importance to the administration of federal justice.

A court of appeals must ordinarily view Distrct Court's factually-grounded order of a new trial on damages under an extremely deferential "abuse of discretion" standard. In relation to punitive damages, that familiar standard is affected by the Due Process Clause and means that when a District Court orders a new trial on punitive damages after a fact-intensive

inquiry, the district judge must be sustained unless wrong beyond all question. Here the Third Circuit ignored that principle. Second, in relation to the first jury's award compensatory damages, the Third Ciruit misapplied th usual federal abuse of discretion standard to Judge Teitelbaum's order for a new trial, where that order was based on a fact-intensive inquiry and should have been paid the greatest deference.

Third, under established federal practice, the second jury's award was flawed. The trial judge refused to instruct the second jury that it must find cross-petitioners' conduct "outrageous" if punitive damages were to be awarded. That failure violated Pennsylvania law and that trial judge's duty to apply that law to the case.

Finally, the Third Circuit permitted the testimony of petitioners' expert witnesses to stand despite the fact that their testimony had no basis in fact or law.

I

THE THIRD CIRCUIT MISAPPLIED THE ABUSE OF DISCRETION STANDARD TO THE ORDER OF A NEW TRIAL ON COMPENSATORY DAMAGES.

With respect to the nullification of the first jury's award of compensatory damages, the standard of review in the court of appeals is the abuse of discretion standard. 6A J. Moore, J. Lucas & G. Grotheer, Moore's federal practice, ¶59.08[6] at 59-177 (2d 1989). In the Third Circuit, this standard is plainly in force and means, in respect to a district judge's disposition of post-trial motions attacking the sufficiency of the evidence, that "it will not be said, that a district judge has abused its discretion if there is 'any basis and reason for [its] conclusions as to weight and injustice of the verdict . . .' " Shanno v. McGee Industrial Enterprised, Inc., 856 F.2d 562, 567 (3d Cir. 1988).[6]

In relation to an order of a district judge founded on factual elements, the abuse discretion standard requires deference by the court

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[6] In the instant case, the Third Circuit flagrantly misdirected itself with respect to its own standard of review. The only case cited for the standard is Semper v. Santos, 845 F. 2d 1233 (3d Cir. 1988). That case was an appeal from and appellate division of the Virgin Islands District Court where the Third Circuit said that the "usual deference" paid to discretionary rulings of a district Court: is inapplicable when one appellate court reviews another." Id. at 1235.

of appeals to the judge's order. A trial judge's order of a new trial on damages predicated on the judge's analysis of the evidence is such an order, for it is a decision "of the Judge who way and heard the witness and has the feel of the case which no appellate printed transcript can inpart." Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212,216 (1947); See; Anderson V. Bessemer City, 470 U.S. 564,580 (1985) (acknowledging that the trial judge "is more closely in touch than the appeals court with the milieu out of which the controversy before him arises"); Henry J. Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 759 (1982) ("The trial court's direct contact with the witnesses places it in a superior position" to determine facts under the abuse of discretion standard).

In relation to an order of a district judge founded on factual elements, the abuse discretion standard requires deference by the court of appeals to the judge's order. A trial judge's order of a new trial on damages predicated on the judge's analysis of the evidence is such an order, for it is a decision "of the judge who saw and heard the witness and has the feel of the case which no appelate printed transcript can inpart." Cone v. West Virginia Pulp & Paper Co, 330 U.S. 212, 216, (1947); See; Anderson v. Bessemer City, 470 U.S. 564, 580 (1985) (acknowledging that the trial judge "is more closely in touch than the appeals with the milieu out of which the

controversy before him arises"); Henry J. Friendly, Indescrition About Discretion 31 Emory L. J. 747, 759 (1982) ("The trial court's direct contact with the witnesses places it in a superior position" to determine facts under the abuse of discretion standard).

This Court has now made it clear that "[w]hen an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable." Cooter & Gell v. Hartmarx Corp, 110 S. Ct. 2447, 2458 (1990). The clearly erroneous standard of Fed.R.Civ.P. 52, the Court recalled, "requires the appellate court to uphold any district court determination that falls within a broad range of permissable conclusions" Id.; accord Anderson, supra. at 574 ("[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous"). Further, under the clearly erroneous rule, the trial judge's inferences of fact are entitled to the same respect as factual determinations. Id. at 580; United States v. United State Gypson Co, 333 U.S. 364, 394 (1948). Deference to the trial judge is especially appropriate where he is in better position than the court of appeals to decide the issue and the issue is factually multifarious, i.e., unyielding to useful generalizations by the appellate court. Cooter & Gell, 110 S. Ct. at 2459-60; cf. Salve Regina College v. Russell, 111 S.Ct. 1217, 1222 (1991) (de novo review proper where district court not "better positioned" to decide an issue of state law, as opposed to mixed question of law, fact, and issue not multifarious).

Although the trial judge's order of a new trial on damages was made under Rule 59, not Rule 52, his order draws strength from Cooter & Gell. Rule 59 gives the judge broad discretion to make a fact-intensive inquiry into the evidence of damage to determine whether the award was excessive. The trial judge made such an inquiry, as his opinion shows. A highly experienced trial judge of the Western District of Pennsylvania, more in touch within "milieu" of the controversy then the Court of Appeals in Philidelphia, Anderson, 470 U.S. at 580, Judge Teitelbaum heard petitioners' testimony about cross-petitioners' conduct, saw petitioners' properties during the jury's view, heard their testimony as to the prices at which their properties had recently been purchased and sold, and heard the Bodnar theory of value which the trial judge plainly thought ridiculous. He made reasonable inferences on the evidence. Under the clearly erroneous rule, his conclusion based on the "overwhelming evidence" that the award was "obscenely excessive" should not have been disturbed by the Court of Appeals merely on the strength of the contrary inference from the Bodnar testimony.

II

AT THE SECOND TRIAL THE DISTRICT COURT ABUSED ITS DISCRETION AS A MATTER OF LAW, AND DENIED DUE PROCESS TO THE PETITONERS WHEN THE COURT REFUSED TO INSTRUCT THE JURY THAT IT MUST FIND CROSS-PETITIONERS' CONDUCT OUTRAGEOUS IN ORDER TO AWARD PUNITIVE DAMAGES.

The first jury's award was properly set aside by the trial judge. The second jury's award of punitive damages was also defective because Judge Smith failed to charge the second jury that punitive damages may not be awarded under Pennsylvania law absent outrageous conduct.

The court explained in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989) that as a matter of federal law, a district judge reviewing an award of punitive damages must ensure that the jury's verdict is "within the confines set by state law." That duty commands than judge to charge the jury respecting the standards for awarding punitive damages as required by state law. Id. This Court held in Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991) that, as a matter of due process, the trial judge must check the jury's award of punitive damages for excess. That requires that he "reflect in the record the reasons for interfering with the jury verdict, or refusing to do so, on grounds of excessiveness, of the [punitive] damages." American Employers Ins. Co. v. Southern Seeding Services, Inc, 931 F.2d 1453, 1457 (11th Cir. 1991) (applying Haslip and quoting relevant decisions of Supreme Court of Alabama).

Judge Smith ignored these principles. Pennsylvania law bars an award of punitive damages unless the jury finds the relevant conduct "outrageous". Rizzo v. Haines, 520 Pa. 484, 507, 55 A.2d 58, 69 (1989); Feld v. Merriam, 506 Pa. 383, 395, 485 A.2d 742, 748 (1984). But Judge Smith charged the jury on April 2, 1990,

that "you're instructed to consider only the conduct that has previously been determined as outrageous." This reflected his mistaken view that a "punitive damage claim is an entirely separate cause of action" and that cross-petitioners' liability on that "cause of action" had been determined by the prior jury. In effect, he mistakenly directed the jury to presume that the cross-petitioners' conduct had been outrageous. See Mason v. Texaco, Inc., 948 F. 2d 1546, 1554 (10th Cir. 1991) ("A punitive damage claim is not an independent cause of action or issue separate from the balance of plaintiff's case. It is part and parcel of a liability determination and does not have any independent being until a jury has decided...that defendant's conduct...was gross, willful, wanton or malicious....").

Liability for punitive damages in Pennsylvania has always depended, inter alia, on the "character" of the acts of the defendant; that requires a determination of outrageousness. Kirkbride v. Lisbon Contractors, Inc, 521 Pa. 97, 102, 55 A.2d 800, 803; See Molzof v. United States, 112 S.Ct. 711, 715-16 (1992) (Common law definition of punitive damages focuses on nature of defendant's conduct). As the first jury's award of punitive damages had been nullified, any determination it may have made about the outrageousness of cross-petitioners' conduct disappeared. It fell to the second jury to redetermine the issue. Its determination to award punitive damages required an evidentiary finding, not a presumption directed by the judge, of outrageous conduct.

After the second jury awarded $674,000 in punitive damages, Judge Smith denied cross-petitioners' motion for a new trial without comment. In refusing to rectify his erroneous charge, Judge Smith abused his discretion on a point of law, a decision reviewable de novo and that should have been reversed. Salve Regina College, 111 S.Ct. at 1222. By the same token, his refusal was a denial of the due process check required by Haslip in that he failed to express on the record the reasons for the denial. American Employers, supra., at 1456-58. Although cross-petitioners joined in the arguement of Consol, Rheinbraun and Monongahela, the ThirdCircuit ignored the matter simply holding that petitioers "clearly showed outrageous conduct."

III

THE DISTRICT COURT ERRED IN PERMITTING TESTIMONY OF PETITIONERS' EXPERT WITNESSES AS TO VALUE WHERE THE TESTIMONY WAS WITHOUT BASIS IN FACT OR APPROPRIATE METHODOLOGY AND FAILED AS A MATTER OF LAW TO ESTABLISH THAT PROPERTY OWNERS WERE PAID LESS THAN FAIR MARKET VALUE.

Prior to the testimony of Gary Bodnar at the first trial, cross-petitionerws and other defendanbts joined in a motion in limine to prohibit the testimony of Garty Bodnar, the petitioners' expert witness. Prior to the second trial on damages, these same parites joined in a similar motion to prohibit the testimony of Gary Bodnar and J. Kenneht Willison. The motions were addressed to the improper methodologies

used in the preparation of the expert opinions and to the conclusions made by the experts which were not supported by the facts.

Under the Federal Rules of Evidence, Rule 702, the role of the expert is not only to explain evidence but to be a source of evidence. The trial judge sits in the best position to determine if the explanation by the expert will assist the jury. However,the determination of whether the underlying evidence should have been allowed is significantly intertwined with the underlying substantive law so as to be reviewable by the appellate court with less deference to the trial judge. In re: Air Crash Disaster at New Orleans, Louisiana, 795 F. 2d 1230, 1233 (5th Cir. 1986). In the instant cases, Judge Smith permitted J. Kenneth Willison's testimony that the right-of-way portion of petitioners' property was worth from $76,000 to $300,000 per acre. These valuations were based on his "analysis" of various sales of commercial and industrial property in the Greene County area.

As Judge Smith succinctly stated in addressing the measurement of damages:

> The measure of damages is to fix the value of the property, and the fixing of the value of the property ought to be governed by virtually the same rules that the valuation of property and condemnation or any other proceeding.

The "rules" governing the valuation of property and condemnation are found in the Pennsylvania Eminent Domain Code ("Code") 26 P.S. §§1-601, et seq. The code requires that "just compensation" be paid for property taken

by condemnation. 26 P.S. §§1-601. Just compensation is defined as consisting of:

> [T]he difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in Code 26 P.S. §1-602(A).The Pennsylvania supreme court has recognized that the value is what the "property owner has lost, not what the condemnor has gained." Garella v. Redevelopment Authority of Allegheny County, 413 Pa. 181, 196 A.2d 344, 348 n.4(1964). This holding was entirely disregarded by the second trial court when it permitted Mr. Willison and Mr. Bodnar to testify as to the fair market value of the petitioners' properties. Mr. Willison, in his analysis considered the properties as commercial or industrial where such was not their use prior to the acquisition. The analysis performed on Mr. Willison clearly departed from the standard set forth in the Code and the law.

Similarly, Mr. Bodnar's testimony failed to meet the court announced and Code-required standard for damages. His valuations were calculated by using the prices paid to the hold-outs and no other independent sales were utilized. Bodnar's testimony was virtually

identical at both trials. In fact, Judge Smith found "the methodology of Mr. Bodnar to be incredible" but permitted the jury to receive the testimony nonetheless.

A review of the jury verdict and a comparison of the award of the jury with the valuation of the petitioners' experts shows clearly that the jurors relied to a great extent on the valuations (A-121a-161a). The Third Circuit has previously held that the Federal Rules establish a liberal policy of permitting expert testimony which will aid the trier of fact. Roe v. Deere & Co., 855 F.2d 151, 155 (3d Cir. 1988). However, it is apparent that the testimony of these experts so far departed from the appropriate means and methods of valuations as set forth in the Code as to be improper.The second Jury's verdict on damages was predicated on a misguided understanding of the applicable law and departed form the appropriate methods of valuation. See: DiRose v. PK Management, 691 F.2d 628, 631 (2.d Cir. 1982);Roe v. Deere & Co., supra.

CONCLUSION

The Court of Appeals failed to pay sufficient deference to Judge Teitelbaum's order setting aside the compensatory award of the first jury under the abuse of discretion standard.

At the second trial, Judge Smith abused his discretion as a matter of law and in denying cross-petitioners' motion for a new trial.

Finally, Judge Smith abused his discretion as a matter of law in permitting petitioners' expert witnesses to testify.

The writ should be granted to rectify these errors and to settle recurring problems of federal law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EWING POLLOCK AND POLLOCK, POLLOCK AND THOMAS,

Cross-Petitioners,

vs.

JAMES E. HUGHES, et al,

Petitioner-*Respondents to Cross-Petition.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION

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Questions Presented

I. **Did not the Third Circuit correctly decide that the trial court abused its discretion in ordering a new trial on damages, when the district court failed to apply the correct Pennsylvania law on damages?**

II. **Did not the first jury make a specific finding that Pollock's conduct was outrageous?**

III. **Did not the district court properly admit the opinion evidence as to value by the experts testifying for the Hughes landowners?**

TABLE OF CONTENTS

Page

Table of Citations iii

STATEMENT OF THE CASE. *1*

A. Introduction *2*

B. Factual Statement. *2*

REASONS FOR DENYING THE CROSS-PETITION *6*

Summary of Argument *6*

I. THE THIRD CIRCUIT CORRECTLY DECIDED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A NEW TRIAL ON DAMAGES WHEN THE DISTRICT COURT FAILED TO APPLY THE CORRECT PENNSYLVANIA LAW ON DAMAGES. *6*

II. THE FIRST JURY MADE A SPECIFIC FINDING THAT POLLOCK'S CONDUCT WAS OUTRAGEOUS IN THE FIRST TRIAL *9*

III. THE DISTRICT COURT PROPERLY ADMITTED THE OPINION EVIDENCE OF THE HUGHES LANDOWNERS' EXPERTS AND DEFENDANTS HAD AMPLE OPPORTUNITY (TWO TRIALS) TO CROSS-EXAMINE THE LANDOWNERS' EXPERTS AND UNCOVER ANY ALLEGED DEFECT THEY CONTEND EXISTED IN THE EXPERTS' METHODOLOGY *11*

CONCLUSION *13*

TABLE OF CITATIONS

Cases Cited: **Page**

Bhaya v. Westinghouse Elec. Corp.,
832 F.2d 258, 259 (3rd Cir.),
cert. denied, 109 S. Ct. 782 (1989) 8

Bonjorno v. Kaiser Aluminum Chemical Corporation,
752 F.2d 802 (3rd Cir. 1984),
cert. denied, 477 U.S. 908 (1986) 8

Breidor v. Sears, Roebuck & Co.,
722 F.2d 1134, 1138 (3d.Cir. 1983) 11

Commonwealth Dept. of General Servs. v. Fake,
45 Pa. Commw. 46, 405 A.2d 971 (1979) 7

Enigh v. Consolidated Rail Corp.,
710 F.Supp. 608, 611 (W.D.Pa. 1989) 12

Fassbinder v. Pennsylvania Railroad Co.,
322 F.2d 859 (3rd Cir. 1963) 6

Huddell v. Levin,
537 F.2d 726 (3d.Circ. 1976) 11

Hughes, et al. v. Consol Pennsylvania Coal Co.,
945 F.2d 594, at 615 (3d.Circ. 1991) 9

In Re: Japanese Electronic Products
Antitrust Litigation,
723 F.2d 238, 276-278 (3d.Cir. 1983)
rev'd on other grounds sub nom 12

In Re: Paoli Railroad Yard PCB Litigation,
916 F.2d 829 (3d.Cir. 1990) 12

Lind v. Schenley Industries, Inc.,
278 F.2d 79, 89 (3rd Cir.),
cert. denied, 364 U.S. 845 (196) 8

Cases Cited (Continued): **Page**

Loughman v. Consol Pa. Coal Co., et al.,
No. 83-921, Slip op at 7-9 11

Matsushita Electrical Industrial Co., Ltd., et al.
v. Zenith Radio Corp.,
475 U.S. 574 (1985) U.S. cert. den.
in 481 U.S. 1029 12

North Shore R.R. v. Pennsylvania Co.,
251 Pa. 445, 96 A. 990 (1916) 7

Pacific Mutual Life Ins. Co. v. Haslip,
111 S.Ct. 1032 (1991) 10

Roe v. Deere & Co.,
855 F.2d 151, 155 (3d.Cir. 1983) 11

United States v. 46,672.96 Acres of Land,
521 F.2d 13, 15 (10th Cir. 1975) 7

Statute Cited:

Pennsylvania Eminent Domain Code,
Act of June 22, 1964, Special Sess., P.L. 84,
as amended, 26 P.S. Secs. 1-402(a) and
Sec. 1-407 4

91-1681
No. 91-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EWING POLLOCK AND POLLOCK, POLLOCK AND THOMAS,

Cross-Petitioners,

VS.

JAMES E. HUGHES, et al.

Petitioner-Respondents to Cross-Petition.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION

STATEMENT OF THE CASE

A review of the record below clearly shows that this cross-petition is a desperate attempt to once again re-argue the facts of the case that was argued and lost before two juries, and the Third Circuit. Petitioners (hereinafter Hughes or Hughes landowners) respectfully pray that the cross-petitioners' (hereinafter Pollock) cross-petition for a writ of certiorari be denied.

A. *Introduction*

Pollock seeks to re-argue facts to this Court after losing two jury trials and its arguments before the Third Circuit. After eleven years of injustice, Pollock wants to deny, unconstitutionally, the Hughes landowners' their Seventh Amendment rights given them by the jury in the first trial. Pollock's cross-petition presents no issue suitable for review by this Court.

The matters raised concern the law of damages in the State of Pennsylvania and the credibility of Hughes' expert witnesses which Pollock was unsuccessful in uncovering, through cross-examination, any defects it contends existed in the experts' methodology. The cross-petition should be denied because the issues were decided correctly below. The matters raised concern Pennsylvania law and the weight the jury gave to properly admitted expert testimony.

B. *Factual Statement*

The Hughes landowners incorporate the facts as stated in their Petition at pages 3-13.

In addition to those facts, the following facts, adduced at trial, contradict Pollock's arguments that Hughes experts' testimony was improperly admitted or that their methodology was improper.

Pollock's expert Julian Fine testified that the only method that could be used to determine the fair market value of the property at issue was the market data approach.[1] Fine went on to state that both the income approach and the cost depreciation approach were inappropriate (TRI, 1762-1763).[2] The market data approach was the same approach or method used by Hughes' expert Gary Bodnar.[3] Fine defined fair market value as follows:

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[1] The market data approach is the use of one, two or three comparable fair market value sales (i.e. near or in the area of the property in question) to determine the fair market value of the property involved.

[2] TRI denotes Trial Record first trial.

[3] In the second trial the Hughes landowners' experts, Gary Bodnar and Kenneth Willison, used the market data approach.

* * *

A. No. That's a little mixed up in my mind. There is fair market value under the definition of fair market value, in a shortened form, willing buyer, willing seller, neither person being under duress or necessity.
Q. And each one fully informed?

A. I forgot that part. Well-informed buyer and seller, exactly.

(TRI at 1778)

* * *

The only selling landowners who met this definition were Culp, Phillippi and Closser.[4]

Not one landowner of the over fifty involved testified on behalf of the defendants[5] that they were willing sellers, well-informed and under no duress or necessity. All of the Hughes landowners testified they were not willing, not informed, and under duress and necessity. Hughes landowners were defrauded, coerced and threatened and forced to sell by the defendants and Pollock and the jury so found.

Fine appraised and valued the Hughes landowners' properties as follows:

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[4] The Culp, Closser and Phillippi sales were the comparable arms length sales used by Hughes' expert Bodnar to determine the fair market value of the Hughes landowners' properties.

[5] The defendants as referred to hereinafter in this Brief in opposition, including Ewing Pollock and Pollock, Pollock and Thomas, are Consol Pennsylvania Coal Company; Greenon Coal Company (formerly called Rheinbraun U.S. Corporation); The Monongahela Railway Company; Consolidation Coal Company; Consol Land Development Company; Maria Theresia Bergbuagesellschaft mbH; Rheinbraun A.G., who previously filed a Petition for Writ of Certiorari at No. 91-1324, and William Reese; David Boggs; and the Upshur Agency, Inc.

Landowner	Appraised Value by Fine	Defendants Paid
Headlee (Home, 25.85 Acres)	$ 75,000	$168,000
Kent (Prime Bottom Land, 13.25 Acres)	55,000	132,500
Morris Levine Enterprises, Inc. (Junked Vehicle Land, 11.985 Acres)	12,000	80,000
Yesenosky (Home, 33.58 Acres)	35,000	67,000
Levine Iron and Metal, Inc. (Scrap Yard, 2.5 Acres)	30,000	70,000
Hughes (Home, 1.45 Acres)	20,000	90,000
McIntyre (Home, 0.423 Acres)	45,000	97,500
Loughman (50.8 Acres)	45,000	65,000
Throckmorton (Home, 111.156 Acres)	100,000	146,000

It is obvious that the fair market values assigned to each property by Fine were erroneous. Defendants paid prices well above those testified to by Fine. Defendants paid those prices even though they were fraudulently coercing the Hughes landowners by threats and outrageous conduct to sell their property. Clearly, the properties were worth much more. But for the defendants misrepresenting the circumstances surrounding Monongahela's property acquisitions, the Hughes landowners would have commanded higher prices, i.e., the prices paid to their neighbor landowners Culp, Closser and Phillippi.[6]

It is factually impossible for any landowner to be a "hold-out" when the railroad had the power to condemn. In a condemnation setting the condemnor has the power to take possession of a landowners' property immediately if the landowner refuses to sell.[7]

Also noteworthy is the fact that the compensatory awards by both juries were in some instances almost identical. For example, the award of compensatory damages for landowner Loughman was $1,450,000 (first jury) and $1,429,556 (second jury). Obviously, Pollock ignores this. As the Hughes landowners proved to two different juries, the fair market value was and is the price defendants were willing to pay to *willing and well-informed* sellers, i.e., Culp, Closser and Phillippi.

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[6] Culp was paid $75,216.00 ***per acre***, no house. Phillippi was paid $146,670.00 ***per acre***, no house. Phillippi's property was right beside landowner Headlees' property acquired by the defendants. Closser was paid $240,168.00 ***per acre***, no house.

[7] *Pennsylvania Eminent Domain Code*, Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. Secs. 1-402(a) and Sec. 1-407.

One final misstatement needs to be corrected. Pollock's statement that the Hughes landowners refused remitter is false (Cross-petition at pg. 8). The trial judge directed the parties "to seek an accommodation as to the damages to be remitted in each case," it was defendants who refused to make any offer to resolve this case despite the verdict.

REASONS FOR DENYING THE CROSS-PETITION

Summary of Argument

The cross-petition should be denied. The Third Circuit correctly reinstated the first jury award.

The issues presented by Pollock are matters of well established Pennsylvania law and are of no interest in the over-all administration of federal justice. Furthermore, Pollock had ample opportunity (in two jury trials that each lasted months) to cross-examine the Hughes landowners' experts and uncover any alleged defect it contends existed in the experts' methodology.

I. *THE THIRD CIRCUIT CORRECTLY DECIDED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A NEW TRIAL ON DAMAGES WHEN THE DISTRICT COURT FAILED TO APPLY THE CORRECT PENNSYLVANIA LAW ON DAMAGES.*

The amount of compensatory damages in this case was determined by applying the law of Pennsylvania. Any review of the record reveals that the trial court adopted an erroneous premise in its decision to grant a new trial on damages. If a decision to award a new trial is inappropriate, the correct solution is to reinstate the first verdict even when an additional theory against a defendant might be retried.[8] The Third Circuit reviewed for an abuse of discretion and reversed the district court. The Third Circuit correctly noted that under Pennsylvania law the issue was "whether the actual loss should be based on the properties use as agricultural lands or the *highest and best use as railroad rights-of-way*" and this question on the evidence was for the jury. (emphasis added).[9] Pennsylvania law provides that when a property owner faces condemnation he or she can show the property's

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[8] *Fassbinder v. Pennsylvania Railroad Co.*, 322 F.2d 859 (3d.Cir. 1963).

[9] Petition at 59a.

special and potential use as a railroad right-of-way.[10] To prove highest and best use, a condemnee must show the land is adaptable to such use and a market need exists for such a use at the time of the condemnation.[11]

Any review of the record points to a manifest abuse of discretion committed by the trial court when it granted a new trial as to damages. At the first trial of this case from each landowner there was testimony adduced as to the location of his land and its prior use. See, e.g. TRI, Ex. 137. There was testimony as to an abandoned railroad right-of-way across the property on some of the Hughes landowners land (TRI, Ex. 39). There was evidence as to the need for a railroad corridor. There was testimony as to comparable sales, i.e., to sales of property for right-of-way purposes in the vicinity of landowner's properties, and there was expert testimony from a licensed broker as to the value of the Hughes landowners' property. By and large, the jury accepted the conclusions of the Hughes landowners' expert, Mr. Bodnar.[12] The Third Circuit correctly decided that the jury's verdict on Mr. Bodnar's findings should have been accepted by the trial court.

At the first trial, Pollock and defendants tried this case as though the Hughes landowners had only residential, agricultural or light industrial properties (TRI 1766-1801). Their appraisers conceded that the comparable sales approach was the correct one. But their appraisers were unfamiliar with the properties and the area.[13] Although some evidence might have supported their position, it was rejected by the jury, and the defendants, including Pollock, offered no alternative valuations for the property. The first jury in this case was not hoodwinked by a slick presentation. It went on a view to look at the properties and the railroad.

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[10] *North Shore R.R. v. Pennsylvania Co.*, 251 Pa. 445, 96 A. 990 (1960); *Commonwealth Dept. of General Servs. v. Fake*, 45 Pa. Commw. 46, 405 A.2d 971 (1979).

[11] *Fake*, 45 Pa. Commw. at 50-51, 405 A.2d at 974. Cf., *United States v. 46,672.96 Acres of Land*, 521 F.2d 13, 15 (10th Cir. 1975).

[12] Petition at 113a.

[13] For example, Mr. Fine, who testified for the defendants and Pollock, was unfamiliar with prices paid to many of the landowners (TRI, 1782-90, 1793-94). Even the court noted credibility problems with Mr. Fine's testimony (*see*, TRI, 1785-87).

The trial court made a basic error in applying incorrect historical use and values to the Hughes landowners property.[14] The trial court's invasion of the jury's province was premised on an error of the appropriate measure of damages, governed by Pennsylvania law. The Third Circuit reviewed this abuse of discretion, and applied the correct law on the measure of damages to wit, the highest and best use as a railroad right-of-way and reinstated the first jury's award.

It is well settled that once an expert is permitted to testify, his qualifications not being challenged, the credibility of his testimony is for the jury to determine. As noted by Judge Smith, "In these cases Plaintiffs presented expert testimony concerning the fair market value of their properties which would support the jury's verdict." (Petition at A77-A79). Judge Teitelbaum's invasion of the jury's decision on the credibility of Bodnar's testimony was clearly an abuse of discretion. This has long been the law.[15]

Pollock, in its cross-petition, inaccurately states that the Third Circuit engaged in speculation when it stated that the Hughes landowners would have demanded higher prices if they knew the truth. This statement has been taken out of context. The Third Circuit clearly saw the fraud and the outrageous conduct in defendants' scheme to defraud the Hughes landowners. In context the Third Circuit stated:

> "As to fair market value, *the prices paid to the hold-outs reflect the market value.* Consol needed each and every piece of property to construct their track. Though the district court correctly characterized Closser, Culp and Phillippi as "hold-outs", it neglected to consider that plaintiffs would have demanded more money had they known what Closser, Culp and Phillippi knew - that Consol was involved and that

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[14] Just as the announcement of the construction of Disney World changed the highest and best use of the swamps around Orlando, Florida into expensive commercial property, the announcement of the construction of the Bailey Mine changed the highest and best use of the property to the only viable access route to the mine to industrial railroad right-of-way property.

[15] Certification was denied on all of these cases. See *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 89 (3rd Cir.), cert. denied, 364 U.S. 845 (196); *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3rd Cir.), cert. denied, 109 S. Ct. 782 (1989); *Bonjorno v. Kaiser Aluminum Chemical Corporation*, 752 F.2d 802 (3rd Cir. 1984), cert. denied, 477 U.S. 908 (1986).

> Monongahela could not have condemned their properties for fixed prices. But for the defendants' scheme misrepresenting the circumstances surrounding Monongahela's property acquisitions, plaintiffs would have commanded higher prices. And these prices more accurately reflect fair market value. The district court abused its discretion by discounting Bodnar's testimony and setting aside the first damage award."[16]

There was testimony at trial that the Hughes landowners had they known the truth would have held-out and demanded fair market value for their property. For example, Floyd King, attorney and negotiator for the landowners Kent and John Throckmorton said if he knew the truth "It would have enhanced my bargaining position considerably." All of the other Hughes landowners testified they would have asked higher sums or not sold at all if they knew the truth. But for the defendants' fraud in misrepresenting the circumstances of the acquisition the Hughes landowners would have demanded higher prices. The law does not speculate on what they might have asked, but gives them the fair market value. Here that value is as a railroad right-of-way across unique property being acquired after the announcement and start of construction of a one hundred million dollar coal mine with billions of dollars of coal to be mined. The first jury's verdict reflects the fair market value of the Hughes landowners' property. This Court should not permit these defendants a third attempt to try this case simply because they were dissatisfied with the amount of damages assessed them by two juries. The Third Circuit correctly decided this case.

II. *THE FIRST JURY MADE A SPECIFIC FINDING THAT POLLOCK'S CONDUCT WAS OUTRAGEOUS IN THE FIRST TRIAL.*

The second punitive damage award was correctly vacated by the Third Circuit. It is a waste of judicial resources for Pollock to argue that the second jury was improperly charged when the second jury's verdict was vacated. Pollock is asking this Supreme Court to vacate the already vacated second jury award for an alleged due process violation.

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[16] *Hughes, et al. v. Consol Pennsylvania Coal Co.*, 945 F.2d 594, at 615 (3d.Circ. 1991); Petition at 60a-61a

Pollock de-emphasizes the fact that the second trial in this case was a trial on damages only. There had already been a finding by the first jury, who heard all the evidence, that there was in fact fraud and outrageous conduct committed by these defendants.[17] The first jury was the only jury that heard all the evidence. As counsel for defendant Consol admitted and argued at the second trial as to the second jury:

> Mr. Katarincic: . . ."I want to really put on the record again, following this question from the jury, the fact that *this jury cannot determine punitive damages without having been the trier of fact with respect to the fraud because punitive builds on fraud*, ..."

(TR2, 3158) (emphasis added).

We agree the first jury was the only jury that could determine the punitive damages in this case. They heard the evidence of fraud and outrageous conduct committed by these defendants - the first jury's verdict should stand. The Third Circuit correctly vacated the second jury's verdict. The Hughes landowners cannot fathom the logic of Pollock. Pollock asks this Court to vacate what has already been vacated.

Furthermore, this record is devoid of any motion or action of these defendants to vacate the punitive damage verdict from the first trial. Erroneously in the first trial when a new trial was ordered for compensatory damages, the defendants, including Pollock, failed to motion the district court to vacate the punitive damage award. A party should not be rewarded for their procedural errors when they fail to protect the record. Because Pollock and the defendants committed this procedural error, the first jury's punitive damage verdict remains of record. The first jury's verdict was correctly reinstated by the Third Circuit.

Finally, the ratio of the *first punitive damage* award to the compensatory damage award is one to one. In *Haslip*[18] this Court accepted a four to one ratio. Clearly, the conservative Pennsylvania punitive damage guidelines do not violate any due process rights as they provided definite guidelines for the jury to follow. This Court

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[17] See Verdict Slip; Petition at 152a-161a.

[18] *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

should not re-write the constitutionally correct Pennsylvania standards for punitive damages. Especially in a case that produced a one to one ratio.

III. *THE DISTRICT COURT PROPERLY ADMITTED THE OPINION EVIDENCE OF THE HUGHES LANDOWNERS' EXPERTS AND DEFENDANTS HAD AMPLE OPPORTUNITY (TWO TRIALS) TO CROSS-EXAMINE THE LANDOWNERS' EXPERTS AND UNCOVER ANY ALLEGED DEFECT THEY CONTEND EXISTED IN THE EXPERTS' METHODOLOGY.*

The Federal Rules of Evidence establish a liberal policy of permitting expert testimony. At no time did Pollock or defendants challenge the qualifications of the Hughes landowners' experts as they could not.

Under Rule 702 of the Federal Rules of Evidence the introduction of expert opinion evidence is permitted when such evidence will assist the trier of fact in understanding the evidence and determining the facts in issue.[19] The admissibility of opinion evidence is within the discretion of the trial court.[20] However, the credibility of the opinion evidence is a determination for the jury, the finder of fact.[21]

The district court at both trials admitted the opinion evidence of Hughes' experts. At the second trial Judge Smith found no reason to exclude the Hughes landowners' expert witnesses' opinions. In his opinion Smith stated that the expert opinion evidence was probative and that its admission was not prejudicial to the defendants.[22] The defendants, including Pollock, never challenged the qualifications of the Hughes landowners' experts as they could not. Furthermore, there was no factual showing under Rule 703 that the data, i.e., the comparable sales of the landowners Culp, Closser, and Phillippi, was

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19 *Roe v. Deere & Co.*, 855 F.2d 151, 155 (3d.Cir. 1983).
20 *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138 (3d. Cir. 1983).
21 *Huddell v. Levin*, 537 F.2d. 726 (3d.Cir. 1976).
22 *Loughman v. Consol Pa. Coal Co., et al.*, No. 83-921, Slip op at 7-9.

not the kind of data reasonably relied upon by experts reaching conclusions in real estate market values.[23]

Pollock could not have made any factual showing because the comparable sales used by the Hughes expert included the data relied upon by experts testifying as to real estate values. The defendants' chose to ignore as comparable sales the *prices they paid* to the knowledgeable landowners. Accordingly, the expert opinion evidence of the Hughes landowners was the only such evidence that should have been admitted.

For Pollock to contend that the methodology of the Hughes landowners' experts was unusual or improper is outrageous. Experts Bodnar and Willison simply applied the market data approach and used as data several comparable fair market value sales. As the testimony, maps and photographs showed, the Culp, Closser, and Phillippi properties are and were arm's length comparable sales right next door to the property of the Hughes landowners. The same sort of comparables that the defendants' experts testified they would use.[24]

Pollock's argument goes to the weight of the evidence not the reliability, methodology or admissibility. The weight to be given an expert's opinion is a matter for the jury. Pollock is doing little more than attempting to re-argue the respective values of the expert testimony. Pollock and the defendants had two jury trials to prove that the Hughes landowners' experts' methodology was defective, and they utterly failed.[25] Justice would not be served by affording them a third attempt to attack Hughes' experts. Pollock's cross-petition should be denied.

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[23] See *Enigh v. Consolidated Rail Corp.*, 710 F.Supp. 608, 611 (W.D.Pa. 1989) a court must make a factual inquiry to determine what experts in the field find reliable and may not substitute its own views on what the court believes constitutes reasonable reliance. ACCORD, *In Re: Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 276-278 (3d.Cir. 1983) rev'd on other grounds sub nom; *Matsushita Electrical Industrial Co., Ltd., et al. v. Zenith Radio Corp.*, 475 U.S. 574 (1985) U.S. cert. den. in 481 U.S. 1029; *In Re: Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d.Cir. 1990).

[24] Testimony of Pollock's expert Donald York at second trial record pages 2480-81 and Defendants' expert Fine in the first trial at TRI 1763.

[25] Expert Willison was cross-examined for two days.

CONCLUSION

Pollock's cross-petition should be denied. The issues they raise were decided correctly by the Third Circuit.

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